U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0150 BLA

DOUGLAS SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAR-K, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 12/15/2016
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-06002) of Administrative Law Judge Lystra A. Harris, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on September 20, 2010.[1] Director's Exhibit 3.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with twenty-one years and ten months of coal mine employment, at least fifteen years of which were spent in underground mines, and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309,[3] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)

[1] This is claimant's second claim for benefits. Claimant's first claim, filed on July 23, 1998, was denied on November 23, 1998, for failure to establish any of the elements of entitlement. Decision and Order at 3; Director's Exhibits 1, 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes fifteen or more years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

(2012). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the award of benefits.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,[6] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, and her determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 1-711 (1983); Decision and Order at 6, 9, 16; Employer's Brief at 4.

[5] The record reflects that claimant's last coal mine employment was in West Virginia. Decision and Order at 4 n.6; Director's Exhibit 1 at 71. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Fino and Rosenberg, together with claimant's medical treatment records.[7] Drs. Fino and Rosenberg opined that claimant does not have legal pneumoconiosis, but suffers from an obstructive impairment due to asthma that is unrelated to coal mine dust exposure. Decision and Order at 18-22; Director's Exhibit 12; Employer's Exhibits 1, 14, 15.

The administrative law judge discredited the opinions of Drs. Fino and Rosenberg because she found that each was inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions and was unsupported by the evidence of record. Decision and Order at 21, 22. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Employer contends that the administrative law judge erred in selectively analyzing and summarily discrediting the opinions of Drs. Fino and Rosenberg as contrary to the preamble. Employer's Brief at 9. Employer asserts that such selective analysis does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer's Brief at 19. Employer also contends that the administrative law judge misinterpreted the preamble to create an irrebuttable presumption that any obstructive lung disease in a retired coal miner is legal pneumoconiosis. *Id*. at 20-22.

Initially, we reject employer's contention that the administrative law judge's use of the preamble rendered the Section 411(c)(4) presumption "irrebuttable." Contrary to employer's argument, in determining the credibility of the medical opinion evidence, the administrative law judge permissibly consulted the preamble as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment.

[7] The administrative law judge noted that Dr. Frazer's treatment notes, dating from May 2010 through February 2012, list chronic obstructive pulmonary disease (COPD), GERD, and coal workers' pneumoconiosis as "active problems," and that additional treatment notes dating from 2009 through January 2010, from a physician whose signature is illegible, each contain diagnoses of COPD or Black Lung. Decision and Order at 21; Claimant's Exhibit 4. The administrative law judge also summarized the opinions of Drs. Klayton and Habre, who opined that claimant does not suffer from asthma, but suffers from legal pneumoconiosis, in the form of obstructive lung disease due to coal mine dust exposure, and is totally disabled due to legal pneumoconiosis. Decision and Order at 20-21; Director's Exhibit 10; Claimant's Exhibits 1, 2; Employer's Exhibit 5, 13.

See Harman Mining Co. v. Director, OWCP [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-211 (6th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd, Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

Specifically, the administrative law judge found that, in eliminating coal mine dust exposure as a cause of claimant's obstructive lung disease, Drs. Fino and Rosenberg relied, in part, on their shared view that claimant's significantly reduced FEV1/FVC ratio is inconsistent with obstruction due to coal mine dust exposure. Decision and Order at 21; Director's Exhibit 12; Employer's Exhibit 1. The administrative law judge permissibly found that the physicians' reasoning for eliminating coal mine dust exposure as a source of claimant's obstructive impairment is in conflict with the medical science credited by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 23.

Employer contends that the administrative law judge ignored the fact that Drs. Fino and Rosenberg cited medical studies published after the preamble to support their opinions that a reduced FEV1/FVC ratio is inconsistent with coal mine dust-related impairments. Employer's Brief at 22-24. Contrary to employer's contention, the physicians' reliance on more recent medical studies did not require the administrative law judge to conclude that advances in science have negated the medical literature addressing the effects of coal mine dust exposure on the lungs that was endorsed by the DOL in the preamble. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (observing that neither of employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the Preamble"). Moreover, employer has not explained how the recent studies relied upon by Drs. Fino and Rosenberg invalidated the science underlying the preamble.[8]

[8] As the Director correctly asserts, the studies primarily relied upon by Dr. Rosenberg do not address coal mine dust-related disease. Nor has employer explained how Dr. Rosenberg's view that non-miners can also exhibit a reduced FEV1/FVC ratio for various health conditions invalidates the science relied on by the Department of Labor (DOL) establishing that a reduced FEV1/FVC ratio is consistent with the pattern of impairment caused by coal dust exposure. Director's Brief at 3, n.5; Director's Exhibit 12 at 4. Further, as the Director asserts, Dr. Fino did not clearly identify the recent studies upon which he relied, or indicate the conclusions he drew from those studies.

The administrative law judge further acted within her discretion in finding that the probative value of both physicians' opinions was diminished by their attribution of claimant's impairment to asthma, when there is no evidence in the medical records they reviewed, or in claimant's medical history, that he has been diagnosed with asthma.[9] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino and Rosenberg, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis.[10] As employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not suffer from pneumoconiosis,[11] *see* 20 C.F.R. §718.305(d)(1)(i), we affirm the

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Director's Brief at 3; Employer's Exhibit 1 at 10; *see Westmoreland Coal Co. v. Cochran,* 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013).

[9] The administrative law judge correctly noted that both Drs. Klayton and Habre specifically opined that claimant does not have asthma, and that Dr. Frazer's medical treatment notes do not contain a diagnosis of asthma. Decision and Order at 20; Director's Exhibit 10; Claimant's Exhibits 1, 2; Employer's Exhibits 5, 13. The administrative law judge also found persuasive Dr. Habre's explanation, that the fact that claimant was not prescribed steroids, and that his medical records do not reflect emergency room visits or hospitalizations for asthma attacks, supported the conclusion that claimant does not have asthma. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 20; Employer's Exhibit 5 at 53-54.

[10] We, therefore, need not address employer's remaining arguments regarding the credibility of the opinions of Drs. Fino and Rosenberg, or employer's arguments regarding the opinions of Drs. Habre, Klayton, and Frazer. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 22.

[11] Thus, there is no merit to employer's contention that the administrative law judge erred in declining to consider whether employer disproved the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 22 & n.18; Employer's Brief at 8.

administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Fino and Rosenberg, that claimant's disabling pulmonary impairment is not caused by pneumoconiosis, because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 22-23. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge